

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

| | | |
|---------------------------------|---|---------------------|
| BRIAN A. DALEY, | : | |
| | : | CIVIL ACTION |
| Plaintiff, | : | |
| v. | : | NO. 02-CV-2629 |
| | : | |
| GRANADA US PRODUCTIONS, et al., | : | JURY TRIAL DEMANDED |
| | : | |
| Defendants. | : | |

ORDER

AND NOW, this day of , 2002, upon consideration of Defendants' Motion for Judgment on the Pleadings, and any opposition thereto, it is hereby ORDERED that the motion is GRANTED. Judgment is hereby ENTERED in favor of Defendants Granada US Production, American Broadcasting Companies, Inc., and Buena Vista Home Entertainment, Inc. d/b/a Walt Disney Home Video and against Plaintiff Brian A. Daley.

BY THE COURT:

J.

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**DEFENDANTS' MOTION FOR
JUDGMENT ON THE PLEADINGS**

Defendants Granada US Productions, American Broadcasting Companies, Inc., and Buena Vista Home Entertainment, Inc. d/b/a Walt Disney Home Video move for judgment on the pleadings under Federal Rule of Civil Procedure 12(c). Plaintiff cannot maintain this copyright infringement claim because the copyrightable elements of the works at issue are not substantially similar as a matter of law. The grounds for this motion are further set forth in the accompanying memorandum of law.

Respectfully submitted,

Joyce S. Meyers (Identification No. 33037)
Michael D. Epstein (Identification No. 62264)
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Attorneys for Defendants

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**DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF
MOTION FOR JUDGMENT ON THE PLEADINGS**

Defendants Granada US Productions, American Broadcasting Companies, Inc. and Buena Vista Home Entertainment, Inc. d/b/a Walt Disney Home Video move for judgment on the pleadings under Federal Rule of Civil Procedure 12(c) on the ground that plaintiff cannot maintain a copyright infringement claim as a matter of law because the works themselves¹ demonstrate that *Princess of Thieves*, the accused work, is not substantially similar to *sHerwood*, plaintiff's copyrighted work.

I. INTRODUCTION AND SUMMARY OF ARGUMENT

In any copyright case, the threshold issue, which can be determined as a matter of law, is whether the accused work is substantially similar to copyrightable elements of the plaintiff's work. If it is not, there can be no copyright infringement. Thus, the Court must determine at the outset whether there is sufficient substantial similarity in the *copyrightable elements* in the two works for plaintiff's claim to proceed. In making the comparison, a court must ignore

¹ The Answer and Affirmative Defenses of Granada US Productions included scripts and videos of *Princess of Thieves* and *sHerwood*.

similarities in elements that are not subject to copyright protection.

The fact that a work is copyrighted does not mean that every element of the work is subject to copyright protection. It is well established that copyright protection is limited to the author's concrete form of expression and does not extend to ideas or generalized themes embodied in the copyrighted work. Similarly, *scenes a faire* or standard sequences of events that follow from a setting or situation are in the public domain and are not protectible. Therefore, copyright infringement cannot be shown by general similarities in theme or idea but requires copying of particular expression through similarities of treatment, details, scenes, events and characterizations.

Even a cursory review and comparison of the two works at issue in this case proves beyond a doubt that they are not substantially similar. Although both works are based on the Robin Hood legend, they tell different stories in entirely different ways: They are in different literary genres, are aimed at different audiences, have entirely different plots, develop through different characters, and express thematic elements through different actions. There is not a single scene that is the same in the two works.

sHerwood is a "jazz swing fantasy" musical play, complete with a witch, three vixens and magical "Sands of Time" that give the gift of eternal youth. *Princess of Thieves*, in stark contrast, is a straightforward children's action-adventure story drawn from the traditional Robin Hood legend. Although both works include a character who is the daughter of Robin Hood — with different names — their character traits, personal histories, actions and motives in the two works are entirely different.

The only similarities between the two works are either elements borrowed from the Robin Hood legend or general themes, all of which are in the public domain. Elements from the

Robin Hood legend, such as archery contests, stealing from the rich to give to the poor, and the conflict between Robin Hood and his enemies, Prince John and the Sheriff of Nottingham, are in the public domain and not protected by copyright. The same is true of generic themes and ideas, such as the *idea* of a daughter of Robin Hood or a story about a young girl coming of age. Since these similarities are not copyrightable, the law is clear that they must be disregarded in the Court's analysis of whether the works are substantially similar. When these noncopyrightable elements are disregarded, there are no similarities between the works.

II. STATEMENT OF FACTS

Plaintiff's work *sHerwood* and defendants' film *Princess of Thieves* are both based on the Robin Hood legend, which is in the public domain. Plaintiff filed a copyright for his work, originally titled *Sherwood Knights* and described as a "musical play," on July 29, 1991. He subsequently filed additional copyrights covering songs and rewritten scripts, the latest filed on August 29, 1997. *See* Exhibit A to Complaint. Defendants' film *Princess of Thieves* was released in March, 2001 and has since been distributed as a video. Complaint, ¶18. Both works use themes, plot elements and characters from the Robin Hood legend, and both include a daughter of Robin Hood.

The plots of the two works, based upon the scripts and videotapes that are part of the pleadings, are summarized below:²

² A more detailed scene-by-scene summary and comparison of the plots, which shows that there are almost no scenes in the two works that are even superficially similar, is attached as Exhibit A.

A. *sHerwood*

Plaintiff's play, *sHerwood*, described in the script as a "jazz, swing fantasy," is a musical play directed to an adult audience and driven by magic and the supernatural. Music is a crucial element in *sHerwood*, in which much of the plot and dialogue develop through songs.

The play consists of several interwoven plot lines. One plot focuses on Prince John's struggle to wrest the throne from his brother, King Richard, who has long been away and is newly returned to England. This part of the story develops through Margaret, a witch, who agrees to help John by killing Robin Hood to prevent him from saving King Richard. In exchange for her help, Prince John agrees to obtain for her the magic Sands of Time, which will give her eternal youth.

Another plot explores the struggle of Marian, Robin Hood's ex-wife. She divorced Robin Hood, whom she still loves, because of her distaste for life in the forest and a desire for a courtly lifestyle in Knottingham Castle, where she lives as the ward of King Richard. She is torn by inner conflict as she is pressured by Prince John to marry him and castigated by Robyn, her teenage daughter, for the role she has chosen in life. After Prince John imprisons King Richard and makes plans to execute him, Marian seeks out Robin Hood to persuade him to come out of "retirement" to help King Richard, and is eventually reconciled with him.

A third plot in *sHerwood* involves the coming of age of Robyn, the daughter of Robin Hood and Marian. Robyn, a typical child of divorce with conflicting loyalties to both of her parents, has been raised by her mother in the castle but has an ongoing relationship with Robin Hood. She rebels against her parents, especially the traditional feminine role her mother has adopted. Her journey to join her father in the forest, dressed in his old clothes, is a product of that adolescent rebellion. Indeed, when the play opens, Robyn is singing about her desire to be

free of society's rules, which she demonstrates by rejecting the lady's dress offered by a maid. She soon falls in love with Junior, the son of Little John, to whom she introduces herself as Roberta, initially concealing her relationship to Robin Hood.

As the plot develops, Robyn, dressed as a boy, goes to Sherwood Forest to join the Merry Men. Her identity is quickly revealed after she defeats Junior in a shooting competition by knocking down a sapling offstage, but, despite her skill, Robin Hood rejects her plea to live in the forest. Marian and Robin Hood discover the romantic relationship between Robyn and Junior, and Marian and Robin Hood discuss their own relationship, making it clear that they are still in love.

Before Robin Hood leaves Sherwood Forest to go to the castle to rescue King Richard, Margaret the witch lures him into a cave, pretending to need his help. She and the vixens then stab him and fill a chalice with his blood. Robyn soon discovers that Margaret and her vixens have killed Robin Hood. After she and Junior declare their love for each other, she vows to avenge Robin Hood's death and promises to meet Junior at the castle. Robyn then goes to Margaret's shack and steals the Sands of Time. Meanwhile, a complex sword fight takes place at the castle, set to extensive choreography and music, during which Prince John kills Junior, most of the Merry Men are killed or captured, and Marian is dragged in and thrown at Prince John's feet. When the others leave, Robyn enters; she tells Marian of Robin Hood's death and Marian tells her that Junior has been killed. While they console each other, the spirits of Robin Hood and Junior enter, and the four of them sing about their love for each other.

The play reaches its climax as Robyn uses the magic powers of the Sands of Time to turn back time to the moment before Robin Hood was killed. The revived Robin Hood grabs Margaret's knife and slits Margaret's throat. Then he and Robyn go off to the castle with the

revived Junior, where Robin Hood saves Junior, Robyn puts a sack over John's head, King Richard is saved, and the Merry Men prevail.

Robin Hood then retires to a castle with Marian while their daughter Robyn joins Junior in Sherwood Forest.

B. *Princess of Thieves*

Princess of Thieves is an action-adventure story for children about Gwyn, Robin Hood's daughter. The *Princess of Thieves* story-line primarily develops through Gwyn, her best friend Froderick, and Prince Philip, son of King Richard the Lionheart and heir to the throne. The action focuses on the efforts of Robin Hood and Gwyn to protect Prince Philip from Prince John, who is determined to kill Philip and assume power himself.

Several major themes are developed through the plot. One major theme is the father-daughter conflict between Robin Hood and Gwyn and the development of their relationship. Initially, Robin Hood is indifferent to his daughter, who is practically a stranger to him; she resents her father's single-minded devotion to the king yet desires his acceptance. As the plot develops, their relationship evolves as they face dangers together and Robin Hood learns to appreciate his daughter's courage and skill. Another main theme involves the transformation of Prince Philip from a self-absorbed coward with no desire to lead into a courageous king who cares about his people. There is also a theme of social injustice, depicted through Gwyn's idealism, her pain because of the suffering of the people, and her successful efforts to make Philip understand his responsibilities.

The story opens in Nottingham Castle where the Sheriff of Nottingham, upon learning that Robin Hood and Marion have a newborn daughter, laughingly removes the price on the child's head, believing that a female child does not pose a threat. Marion dies soon after giving

birth to Gwyn, and Gwyn is raised in an abbey by Friar Tuck. In conversation with her best friend Froderick, Gwyn expresses her frustration about Robin Hood's long absences, having seen him only a few times in her life.

Meanwhile, Prince John learns that King Richard has been mortally wounded in Jerusalem and that Prince Philip, Richard's son and heir, is on his way from France. Prince John, who wants the throne for himself, orders the Sheriff to kill Prince Philip and to make sure that Robin Hood does not return to England to interfere.

Robin Hood does return, however, and appears at the Abbey after a five-year absence. He greets Gwyn briefly, then turns to other things, leaving her crestfallen. Although Gwyn is eager to demonstrate her skill at riding and archery to her father, Robin Hood gives priority to his mission of protecting Prince Philip, ignoring the advice of his friend Will Scarlett to pay more attention to his daughter. When Robin Hood refuses Gwyn's request to go with him to protect Philip, Robin Hood and Gwyn part angrily, and Gwyn cuts her hair, dresses in Froderick's clothes, and leaves the Abbey dressed as a boy. Gwyn is next seen entering a crowded marketplace, where she protects a child from an abusive merchant, steals the merchant's bag and gives it to some poor children. Afterward, she is chased into the forest by the Sheriff's men.

In the forest, she meets Prince Philip, who had escaped to the forest after being attacked by Cardaggian, the Sheriff's henchman, during his journey from France. Both Gwyn and Philip hide their true identities, though both admit that they are fugitives. Philip at this time has no desire to be king, preferring wine and dancing to affairs of state, and wants to return to France rather than engage in battle. Gwyn persuades him to travel with her to save Robin Hood, who has been captured, and to prevent Prince John from taking the throne. Along with Philip and Froderick, Gwyn faces many dangers and challenges, repeatedly demonstrating how well she can

wield a sword and shoot an arrow when she battles the Sheriff's men. Her idealism and concern for the people of England help to transform Philip into a leader, who comes to embrace public life and the responsibilities and dangers associated with it. After Froderick is wounded in battle, Philip reveals his identity and leads Gwyn and the Merry Men to rescue Robin Hood.

After Robin Hood is rescued, he, Gwyn and Prince Philip successfully fight off the Sheriff's men and stop the coronation of Prince John. During the battle, Gwyn shoots an arrow to intercept the Sheriff's arrow as it heads straight at Robin Hood, thus saving her father's life. Though Gwyn and Philip acknowledge their love for each other, they are not able to marry since he becomes king and she remains a commoner. The film ends with Robin Hood acknowledging that Gwyn is just like him and inviting her to join him as his partner in service to King Philip.

III. ARGUMENT

A. Where The Copyrightable Elements Of The Two Works Are Not Substantially Similar, Judgment On The Pleadings Should Be Granted.

“The mere fact that a work is copyrighted does not mean that every element of the work may be protected.” *Feist Publications, Inc. v. Rural Telephone Service Co., Inc.*, 499 U.S. 340, 348 (1991). It is axiomatic that copyright protection does not extend to an *idea* embodied in the copyrighted work but is limited to the author's *expression* of an idea. *Id.* at 344-45. *See also Warner Bros. Inc. v. American Broad. Cos., Inc.*, 654 F.2d 204 (2d Cir. 1981) (“[G]eneralized themes and ideas lie in the public domain and are not copyrightable.”) (citations omitted). Similarly, *scenes a faire* or “sequences of events that ‘necessarily result from the choice of a setting or situation’” are not protectible. *Williams v. Michael Crichton*, 84 F.3d 581, 586 (2d Cir. 1996); *Segal v. Paramount Pictures*, 841 F. Supp. 146, 149 (E.D. Pa. 1993); *Herzog v. Castle Rock Entertainment*, No. 97-505-CIV-MIDDLEBROOKS, 1998 U.S. Dist. LEXIS 22503, at

*16-17 (S.D. Fla. Sept. 29, 1998). Moreover, incidents, characters or settings that are indispensable or standard in the treatment of a given topic are not copyrightable. *See Warner Bros. Inc.*, 654 F.2d at 208; *Herzog*, 1998 U.S. Dist. LEXIS 22503 at *16-17. Thus, copyright infringement cannot be shown by similarity in general theme or idea but requires copying of particular expression through similarities of treatment, details, scenes, events and characterizations. *Reyber v. Children's Television Workshop*, 533 F.2d 87, 91 (2d Cir. 1976).

Noninfringement may be determined as a matter of law when no reasonable jury could find the two works substantially similar or when the similarities between two works consist only of noncopyrightable elements. *Beal v. Paramount Pictures Corp.*, 20 F.3d 454 (11th Cir. 1994); *see also Sid & Marty Krofft Television Productions, Inc. v. McDonald's Corp.*, 562 F.2d 1157 (9th Cir. 1977) (finding substantial similarity may be decided as a matter of law). Thus, as a threshold matter, the Court must determine from viewing the works themselves whether there is sufficient substantial similarity in copyrightable elements for plaintiff's claim to proceed.

The determination whether the copyrightable elements of the works are objectively similar is based on what is often referred to as the extrinsic test.³ This test focuses on the objective similarities in specific expressive elements, such as plot, themes, dialogue, mood, settings, pace and sequence of events in the two works. *See, e.g., Kouf v. Walt Disney*

³ The substantial similarity test also contains a subjective component, or intrinsic test, which focuses on whether an ordinary reasonable person would find similarity of expression in the "total concept and feel" of the two works. Because plaintiff cannot prove objective similarity and cannot pass the threshold requirement under the extrinsic test, the Court need not consider the subjective prong of the substantial similarity test. In any event, plaintiff would be unable to prove substantial similarity under the subjective test.

Pictures & Television, 16 F.3d 1042, 1045 (9th Cir. 1994). In other words, the test does not compare “basic plot ideas for stories” but focuses on “the actual concrete elements that make up the total sequence of events and the relationships between the major characters.” *Berkic v. Crichton*, 761 F.2d 1289, 1293 (9th Cir. 1985); *Weygand v. CBS, Inc.*, 1997 U.S. Dist. LEXIS, 10613 at *18 (C.D. Cal. 1997) (quoting *Narrell v. Freeman*, 872 F.2d 907, 912 (9th Cir. 1989)). It “looks beyond the vague, abstracted idea of a general plot and instead focuses on . . . the objective details of the works . . .” *Id.*, citing *Litchfield v. Spielberg*, 736 F.2d 1352, 1356 (9th Cir. 1984).

A comparison of *sHerwood* and *Princess of Thieves* based on the copyrightable elements in each leads to the inescapable conclusion that the two works are not at all alike. Because a review of the concrete expression of plots, characters, themes, settings or sequence of events in the works reveals that they are not substantially similar under the extrinsic test, plaintiff’s copyright claim must fail as a matter of law, and judgment on the pleadings should be granted under Federal Rule of Civil Procedure 12(c).

B. Ideas, Generic Themes, And Material In The Public Domain Are Not Copyrightable And Must Be Excluded From An Analysis Of Substantial Similarity.

Copyright law does not protect “the general idea for a story” or “situations and incidents which flow naturally from a basic plot premise, so-called *scenes a faire*.” *Berkic*, 761 F.2d at 1293. Thus, when two works are based on a well-known story or theme, substantial similarity cannot be based on similar characters, settings or action sequences arising from that common source. *Segal*, 841 F. Supp. at 149 (finding no substantial similarity as a matter of law between a screenplay and motion picture based on the *Star Trek* series despite many of the same characters, a similar setting and common action sequences).

Courts have consistently held that similarities in general themes or ideas and standard elements flowing from them do not establish infringement. In *Williams*, 84 F.3d at 589, for example, the Second Circuit held that *Jurassic Park* did not infringe on plaintiff's work because the "setting of a dinosaur zoo or adventure park, with electrified fences, automated tours, dinosaur nurseries, and uniformed workers" constitute "classic *scenes a faire* that flow from the uncopyrightable concept of a dinosaur zoo." Similarly, in *Zambito v. Paramount Pictures Corp.*, 613 F. Supp. 1107, 1112 (E.D.N.Y. 1985), the court held that scenes in *Raiders of the Lost Ark*, such as a treasure hidden in a cave inhabited by snakes, fire being used to repel snakes, birds frightening an intruder in the jungle and a weary traveler seeking solace in a tavern, were elements naturally arising from the treatment of the unprotectible idea of an archeologist searching for artifacts, and were "as a matter of law, simply too general to be protectible." See also *Walker v. Time Life Films, Inc.*, 784 F.2d 44, 50 (2d Cir. 1986) ("elements such as drunks, prostitutes, vermin and derelict cars would appear in any realistic work about . . . policemen in the South Bronx"); *Weygand*, 1997 U.S. Dist. LEXIS 10613 at *19-20 (finding no infringement in film about black farmer adopting white boy because similarities to plaintiff's work were *scenes a faire* arising out of the general story idea, e.g., a boy struggling with racism, the boy getting in trouble, scenes of cutting wood and rabbit hunting, and the boy leaving home and returning as a "hero").

An objective comparison of *sHerwood* and *Princess of Thieves* makes it clear that the only similarities shared by the works are generalized ideas or themes or protected *scenes a faire*, which cannot support a claim of infringement because these elements are not copyrightable. The Court can take judicial notice that the Robin Hood legend has been in the public domain for centuries and has been the subject of countless books, stories, songs and films. Everyone knows

Robin Hood's skill with a bow and arrow, his fame for stealing from the rich to give to the poor, and his loyalty to King Richard the Lionheart. These elements of Robin Hood's character cannot be the subject of a copyright claim. Similarly, standard plot elements from the Robin Hood story, such as archery contests, disguised identities, and the ongoing conflict between Robin Hood and his arch enemies, Prince John and the Sheriff of Nottingham, are *scenes a faire* not subject to copyright protection. Stock characters from the Robin Hood legend, such as Friar Tuck, Lady Marian and Merry Men such as Will Scarlett likewise are in the public domain and are not copyrightable. The use of such characters, themes and plot elements in *Princess of Thieves* cannot support a finding of substantial similarity.

Princess of Thieves is set firmly within the Robin Hood legend. It necessarily follows, therefore, that the story-line would revolve around an outlaw who battles the evil villains to ensure that the rightful heir ascends to the throne. Gwyn, Robin Hood's daughter, embodies *scenes a faire* drawn from the legend: (1) she excels at archery like her father and wins an archery contest by splitting a competitor's arrow; (2) she, like her father, steals from the rich to give to the poor; and (3) she assists Robin Hood in battling the villains, Prince John and the Sheriff of Nottingham, and placing the rightful king on the throne.

Because every Robin Hood legend "necessarily" includes a plot involving Robin Hood's triumph over the evil Sheriff of Nottingham and Prince John, Robin Hood's unmatched archery skills, his kindness to the poor, and his rugged forest life-style, these scenes are not protectible as a matter of law. Further, the scenes where Gwyn dresses like a boy and exhibits talents similar to her father naturally flow from the Robin Hood tale — and are common characteristics in tales about women trying to gain acceptance in a man's world generally. For a woman to integrate into the outlaw band of men, she must dress like a man. Indeed, the use of disguises of many

kinds is a common element in Robin Hood tales since he and the Merry Men are outlaws who need to elude the authorities to carry out their plans.

Moreover, because copyright protection does not extend to an idea, plaintiff's copyright infringement claim cannot be based on the *idea* of a story about a fictional daughter of Robin Hood.⁴ See *Warner Bros.*, 654 F.2d at 209 ("owners of the Superman copyrights not entitled to a monopoly of the mere character of a 'Superman' who is a blessing to mankind"); *Zambito*, 613 F. Supp. at 1111 (the character of an archeologist searching for artifacts is unprotectible); *Walker v. Time Life Films, Inc.*, 784 F.2d at 49 (policeman battling the hostile environment of the 41st precinct of the Bronx not copyrightable).

Similarly, the idea of a young person coming of age is a generic theme that is not subject to copyright protection. Indeed, coming of age stories are a common literary genre, used in such divergent works as *Little Women*, *Great Expectations* and *Catcher in the Rye*. A young person's struggle with coming into adulthood and finding herself while seeking acceptance from those around her is a general plot *idea* and, thus, unprotectible. See, e.g., *Kouf*, 16 F.3d at 1045 (finding a "life struggle of kids fighting insurmountable dangers" a general plot idea undeserving of copyright protection). Coming of age stories typically involve the common elements of conflict with and rebellion against parents, meeting challenges, seeking a place in the world and falling in love. Such plot elements are *scenes a faire* in a coming of age story that are not subject

⁴ As demonstrated below, the two works treat the character of Robin Hood's daughter differently in terms of character and plot. In any event, the idea of Robin Hood's daughter is not the original creation of plaintiff but was introduced more than 30 years before plaintiff's claimed copyright in a 1959 film entitled *The Son of Robin Hood*, in which the "son" is really Robin Hood's daughter.

to copyright protection.⁵

Because a finding of substantial similarity cannot rest on these noncopyrightable elements, the Court must limit its analysis to the concrete expression of plot, dialogue and character. As shown below, plaintiff's copyright claim must therefore fail as a matter of law because there are no similarities in copyrightable elements of the two works.

C. The Copyrightable Elements Of Plot, Dialogue And Character In The Two Works Are Not Substantially Similar.

Once the noncopyrightable elements that flow from the Robin Hood legend and coming of age stories are removed from the analysis, there is nothing even remotely similar about the remaining elements of the two works. In fact, the overall plots, characters, and dialogue are remarkably different.

Princess of Thieves is a children's action-adventure story focusing on Gwyn's use of her skills and courage to win her father's respect and put Prince Philip on the throne while *sHerwood* is an adult jazz swing musical driven by supernatural elements and focusing on such modern adult themes as divorce, lifestyle choice, sibling rivalry and romantic relationships. The plot sequence is also entirely different, as demonstrated by the scene-by-scene plot summary chart attached as Exhibit A. It is clear, therefore, that *Princess of Thieves* and *sHerwood* are so fundamentally and *objectively* different that, as a matter of law, plaintiff's claims must fail.

⁵ Plaintiff's complaint, for example, points to the fact that each female character: (a) is immersed in a "battle of the sexes," wherein each attempts to prove herself to her father and the other men in her life; (b) falls in love; and (c) proves her worth and equality during an encounter with the villain. See Compl., Ex. A, at ¶ 19. Scenes involving the challenges faced by the young women in the two works, including their struggle for recognition of their talents, seeking their parents' approval, and falling in love, are clearly generic *scenes a faire* common to any coming of age story and, as such, are not copyrightable. In any event, the concrete expression of these generic themes in the two works is not at all similar.

1. The Plot Sequence In The Two Works Is Entirely Different.

The plots of the two works are not similar except on the most general level. Both plots tell a typical Robin Hood tale about a struggle for the throne, coupled with a coming of age story with a feminist slant. The similarity, however, ends there — and because the plot sequence and specific scenes are vastly different, these general likenesses are insufficient to establish substantial similarity as a matter of law.

Numerous courts have held in similar cases that similarities at a general level cannot overcome differences in the specific expression of the ideas. In *Segal*, 841 F. Supp. at 149, the plaintiff claimed that the film *Star Trek VI: The Undiscovered Country* infringed his copyrighted screenplay for a Star Trek movie entitled *Inside the Klingon Empire*. The court held that the two works were not substantially similar as a matter of law. Despite recognizing that the works shared many of the same characters, a similar setting and some common action sequences, the court concluded that "the existence of some common features in the face of overwhelming differences between the works is insufficient to show substantial similarity." *Id.*

Similarly, in *Walker*, 784 F.2d at 49, the Second Circuit affirmed the dismissal of plaintiff's claim that defendants' film, *Fort Apache: The Bronx*, infringed on his book *Fort Apache* on the grounds that the works were not substantially similar as a matter of law. In so holding, the court stated: "At the most general level, the movie and the book tell the same story. . . . But, in moving to the next level of specificity, differences in plot and structure far outweigh this general likeness." *Id.* See also *Litchfield v. Spielberg*, 1983 U.S. Dist. LEXIS 16317, at 6 (holding that *E.T.* did not infringe on children's play entitled *Lokey from Maldemar* because plots, which included aliens stranded on earth who meet earthlings, demonstrate "extra-

terrestrial” powers such as levitation and telepathy, are pursued by authoritarian characters, and ultimately return home, are similar only on general level).

Here, too, the overwhelming differences in the plots of *Princess of Thieves* and *sHerwood* far outweigh any general similarities that may exist. As explained above, *Princess of Thieves* is an adventure story about Robin Hood’s daughter using her talents and skills to join the adult characters, including her father, in their battle against the villainous Prince John on behalf of Prince Philip, the rightful heir to the throne. *sHerwood*, on the other hand, primarily focuses on Prince John’s alliance with Margaret the witch to ensure Robin Hood’s downfall through magic, with romantic subplots involving Robyn and Junior and Marian and Robin Hood. The only similarities between the plots of the two works, therefore, flow from the Robin Hood legend and the *idea* of Robin Hood’s daughter coming of age. Because these elements are *scenes a faire* that are not protected by federal copyright law, they do not support a copyright infringement claim.

As shown in the detailed plot summaries attached as Exhibit A, the sequence of events and the events themselves are entirely different in the two works. Indeed, there is not a single scene that is the same in the two works. The entire subplot involving Margaret the witch in *sHerwood* — including the significant plot lines involving her killing of Robin Hood, her losing the Sands of Time, and Robyn's use of the Sands of Time to bring Robin Hood and Junior back to life — does not appear in *Princess of Thieves*. Similarly, the plot involving Lady Marian, her love for Robin Hood and her fear of marrying John, is unique to *sHerwood* as Marion dies during the opening credits of *Princess of Thieves*.

There are also plot lines in *Princess of Thieves* that do not appear anywhere in *sHerwood*. For example, the entire plot about Prince Philip’s transformation from a self-absorbed coward

devoted only to wine and dancing into a socially conscious leader who takes on responsibility and cares about the people is unique to *Princess of Thieves*. Also unique to *Princess of Thieves* is the plot line devoted to the love triangle between Gwyn and Philip and Froderick.⁶

Even the few scenes in *Princess of Thieves* that have a counterpart in *sHerwood*, such as a battle in the castle, the capture of Robin Hood, Robin Hood's daughter demonstrating her skill in archery or being kind to the poor, are portrayed very differently and serve different purposes in the works as a whole. In any event, these scenes are noncopyrightable *scenes a faire* arising out of the Robin Hood legend.

Aside from the plot sequence, the dialogue through which the action is expressed is completely different. In *sHerwood*, much of the dialogue is communicated through song lyrics. Margaret and Prince John express their evil desires for power through song, Marion sings about her inner conflicts over the men in her life and her lifestyle choice, Robyn and Marion sing about the men they love, the lovers sing love duets, and the Merry Men sing about their grievances against Prince John's rule. Songs are used in *sHerwood* to express motives, inner conflicts, and relationships between the central characters. Indeed, some scenes consist entirely of song. In stark contrast, *Princess of Thieves* is an adventure story, with a focus on action rather than reflection. There are no songs, and music is used only as a backdrop to action.

Although the two works share some general themes and elements, based on the Robin Hood legend and the idea of Robin Hood's daughter, a comparison of the plot sequence and the

⁶ Froderick's love of Gwyn is communicated in numerous scenes. He goes so far as to lie to Philip about his relationship with Gwyn to try to discourage Philip's attraction to Gwyn. Ultimately, though, Froderick saves Philip's life by stepping in front of an arrow headed for the prince because he recognizes how much Gwyn loves Philip. There is no story line even remotely similar in *sHerwood*.

actions and dialogue within each scene establish that these works are not at all alike.

2. *Princess of Thieves* Does Not Use Any Character That Is Substantially Similar To A Copyrightable Character In *sHerwood*.

Aside from Robin Hood's daughter and certain uncopyrightable characters borrowed from the Robin Hood legend, the two works develop through different characters. Moreover, even the characters who appear in both works are materially different in presentation and development in the two works. For example, Friar Tuck and Will Scarlett are key characters in *Princess of Thieves*, with individualized personalities, significant relationships with Robin Hood and Gwyn, and material roles in the plot. These same characters appear in *sHerwood* only as part of an undifferentiated group of "Merry Men." Marian and King Richard are major characters in *sHerwood*, but are both entirely absent in *Princess of Thieves*.⁷ In addition, critical characters who are not drawn from the Robin Hood legend – such as Prince Philip, Conrad, Froderick, and Cardaggian in *Princess of Thieves*, and Margaret and Junior in *sHerwood* — are unique and have no counterpart in the other work.

General similarities between characters in different works are not sufficient to establish substantial similarity. See *Zambito*, 613 F. Supp. at 1110 ("any similarity ends, however, with the fact that both [protagonists] are male and are archaeologists"); *Davis v. United Artists, Inc.*, 547 F. Supp. 722, 727 (S.D. N.Y. 1982) ("stock" characters of young patriotic men becoming confused in their values as a result of war experiences in Vietnam cannot support a finding of substantial similarity); *Herzog*, 1998 U.S. Dist. LEXIS at *45-46 (law enforcement officers whose fathers were sheriffs do not establish substantial similarity in stories about investigating a

⁷ Of course, Friar Tuck, Will Scarlett, Marion and King Richard are all drawn from the Robin Hood legend and are therefore in the public domain.

murder in a small Texas town); *Weygand*, 1997 U.S. Dist. LEXIS 10613 at *26 (characters in two stories about African-American farmers adopting a white boy in a rural setting in the depression are not substantially similar). An objective review of the significant characters in *sHerwood* and *Princess of Thieves* demonstrates that the characters in the two works are not substantially similar.

a. Robin Hood's Daughter

An objective comparison between Gwyn in *Princess of Thieves* and Robyn in *sHerwood* demonstrates that the treatment of this character in the two works is entirely different. Gwyn, the daughter of Robin Hood in *Princess of Thieves*, has led a humble life. Her mother, Marion, is dead and her father has been away for years in the service of King Richard the Lionheart. She was raised at the Abbey by Friar Tuck and has had little contact with her father, whom she both admires and resents. Angered by her father's indifference to her and refusal to acknowledge her talents, she leaves the Abbey dressed as a boy. The focus of her actions through the rest of the film is to demonstrate her courage and skills by rescuing Robin Hood after he is captured and assuring Prince Philip's ascension to the throne. She is socially conscious and idealistic, expressing anger and frustration at how the people of England are treated, and is determined to do whatever she can to change their fate. In fact, that is her primary motivation for wanting to see Prince Philip ascend to the throne. It is through her that Philip comes to understand social responsibility and to accept his destiny to serve his people as king.

Robyn in *sHerwood*, on the other hand, has primarily been raised by her mother in Nottingham Castle. She has lived in relative luxury, as shown in the first scene when a maid enters to help her dress. Marian has been a central force in Robyn's life, although in adolescence she rebels against her mother's courtly life-style. Unlike Gwyn in *Princess of Thieves*, she has

had an ongoing relationship with her father throughout her youth, although, like a typical child of divorce, she is torn between her loyalties to both parents. To rebel against her mother's traditional feminine role and dependence on men – first, Robin Hood, then King Richard and Prince John – Robyn dons her father's old clothes and goes off to Sherwood Forest in search of adventure with her father's band of Merry Men. Her primary focus in the play is her search for identity and her relationships with Junior and with each of her parents. Other than one act of kindness — giving a poor woman a scarf — she demonstrates no overt social activism or political philosophy.

In addition to the different backgrounds and motivations of these characters, the plot elements involving them are starkly different. For example, although both demonstrate skill with a bow and arrow,⁸ only Gwyn uses this skill to advance the plot by gaining entry to the castle and protecting Prince Philip and Robin Hood. First, she wins an archery contest by splitting the Sheriff's arrow lodged in the bulls-eye, winning the prize of dinner in the castle. Then, when she and Philip are trying to rescue Robin Hood from prison, Gwyn saves Philip by shooting a guard in the hand. Later, during a battle scene in the castle, she intercepts the Sheriff's arrow as it is heading straight for Robin Hood, thus saving Robin Hood's life. In contrast, Robyn in *sHerwood* uses her bow and arrow only to impress the Merry Men by outshooting Junior; she never uses her bow and arrow again in the play, and her archery skill has no impact on Prince John's struggle to wrest the throne from Richard.

⁸ Skill with a bow and arrow is a generic *scene a faire* that naturally arises from being the daughter of Robin Hood, whose skill as a champion archer is an inherent part of the Robin Hood legend.

Plaintiff alleges that both daughters are alike in that they are kind to the poor. Again, this generic character trait attributable to the Robin Hood legend is manifested in completely different ways in the two works. In *sHerwood*, Robyn tries to steal bread for herself and is ejected by an innkeeper. Outside the inn, she meets Junior, son of Little John, who enters the inn to buy her some food. While she is waiting for him, a poor woman asks her for money, and she gives the woman her scarf instead. This incident has no relation to the larger plot involving Prince John's attempt to wrest the throne from King Richard. In contrast, in *Princess of Thieves*, Gwyn intercedes on behalf of a young boy accused of stealing in a marketplace. To distract the merchant and his rich customer, Gwyn steals a bag of venison pies and gives them to some poor children. While in *sHerwood* Robyn's act of kindness serves no purpose but to impress Junior and contribute to their budding romance, in *Princess of Thieves* Gwyn uses this incident of stealing from the rich to give to the poor to make a political statement to Froderick about Prince John's cruelty and injustice. The incident also advances the plot by making Gwyn a fugitive and causing her to retreat to the forest, where she meets Philip.

The character of Robin Hood's daughter, therefore, is expressed differently by their backgrounds, personal characteristics and motivations in the two works, as well as by their actions and role in plot development. Indeed, any similarity between Gwyn and Robyn ends with the fact that each is Robin Hood's daughter and demonstrates some of his standard character traits, which are expressed and used very differently in the two works.

b. Robin Hood

The character of Robin Hood is in the public domain and therefore cannot support an infringement claim. In any event, the characterization of Robin Hood in the two works is quite different. The Robin Hood of *Princess of Thieves* is still at the height of his powers and often

travelling in service to the king. He remains focused on his duties and is indifferent to his daughter, whom he does not see for years at a time. On the other hand, *sHerwood*'s Robin Hood is a forty year-old tired hero who is past his prime. He is divorced from Marian but has an ongoing relationship with his daughter. He wanders through the forest hunting deer, avoiding the challenges that dominated his young life. Although he is persuaded by Marian, whom he still loves, to attempt to help King Richard, he is content at the end to retire to a castle with Marian and let his daughter and Junior take over as leaders of the Merry Men. In contrast, in *Princess of Thieves*, Robin Hood and Gwyn work together to defeat Prince John and become partners in serving the newly crowned Prince Philip.

c. The Villains

The stock villains in the Robin Hood legend are Prince John, the jealous brother of King Richard, and his evil henchman the Sheriff of Nottingham. Both characters are in the public domain, and their ongoing plots to capture or kill Robin Hood to advance their own political goals are standard elements in Robin Hood stories. These characters and their plots against Robin Hood and the rightful king cannot support a copyright infringement claim.

In any event, the two works portray these characters differently. In *sHerwood*, Prince John takes center stage as the vain, jealous and overly ambitious villain, determined to usurp the throne from his brother King Richard and motivated, as he admits, by sibling rivalry and his desire to have Marian as his wife. His primary ally is another villain — the witch Margaret, who uses her magic powers to entrap Robin Hood. The Prince John in *Princess of Thieves*, however, is secondary to the villainy of the Sheriff of Nottingham. Instead of taking the primary role as villain, Prince John in *Princess of Thieves* merely directs the plot and orders the Sheriff to kill Robin Hood.

In *Princess of Thieves*, the Sheriff of Nottingham is a major character who is depicted as the calculating, vengeful, cold-hearted, and self-serving right-hand of the evil Prince John. It is the Sheriff who is the focus of evil. In sharp contrast, The Sheriff of Nottingham is a minor character in *sHerwood*, who has no developed character and very little role in the plot. He is a timid, tangential non-character who appears in a small number of scenes simply to serve Prince John.

d. Unique Characters

Aside from Robin Hood's daughter and characters borrowed from the Robin Hood legend, every other character is unique to the particular work. Major characters such as Prince Philip, Conrad, Froderick and Cardaggian are unique to *Princess of Thieves* and have no counterpart in *sHerwood*. In *sHerwood*, Margaret the witch, her vixens, and Junior are unique and have no parallel counterpart in the other work.

Prince Philip, the deceased King Richard's illegitimate son and the rightful heir to the throne, is a principal character in *Princess of Thieves* whose development is significant to the plot. While at first rejecting his duty to serve as king, he encounters Gwyn, who teaches him about duty, love, and the plight of his people. His growth into a leadership role and acceptance of responsibility for service to his people is a central theme in the story.

Another unique character is Froderick, Gwyn's best friend, who journeys with her and serves an important role in *Princess of Thieves*, often acting as Gwyn's conscience and ally in battle. Like Prince Philip, Froderick highlights Gwyn's characteristics and traits and are integral to the plot development.

Cardaggian, the Sheriff's right hand man in *Princess of Thieves*, also has no counterpart in *sHerwood*. He has a central role in the plot in connection with tricking Philip, killing Conrad,

Philip's valet, and capturing Robin Hood. Conrad is also a unique character who has no counterpart in *sHerwood*.

In *sHerwood*, Margaret the witch and her vixens play a central role in the plot development. She kills Robin Hood through magic in order to obtain the Sands of Time, which Robyn ultimately steals from her and uses to bring Robin Hood and Junior back to life. Margaret's death is one of the major climaxes of *sHerwood*. Margaret also helps set the dark sinister tone of *sHerwood*. Obviously, there is no character at all similar to Margaret in *Princess of Thieves*.

Junior is another central character in *sHerwood* who has no counterpart in *Princess of Thieves*. While plaintiff tries to compare him with Prince Philip, as the "love interest" of Robin Hood's daughter, the two characters have nothing in common. Philip is a prince who is forced to disguise his identity through most of the film because his life is in danger. His character changes and grows as the story develops and he gradually comes to understand — because of Gwyn's idealism and forceful personality — his destiny and responsibilities. Junior, on the other hand, lives in Sherwood Forest as one of the Merry Men. His primary role in the plot is his romantic relationship with Robyn, and he does not develop in any way as the story progresses. Moreover, at the end of *sHerwood*, Junior and Robyn are a romantic couple; in contrast, the end of *Princess of Thieves* finds Philip and Gwyn in the roles of king and subject.

In short, all of the characters in the two works other than Robin Hood's daughter are either stock characters from the Robin Hood legend or are unique to the particular work in which they appear. Moreover, the idea of Robin Hood's daughter is expressed very differently in the two works aside from generic character traits attributable to their age or their identity as the

daughter of Robin Hood. Thus, an objective comparison of the characters in the two works establishes that there is no substantial similarity in copyrightable elements.

D. The Alleged Similarities In The Two Works Cited In The Complaint Constitute Noncopyrightable *Scenes A Faire* And Are Irrelevant To A Substantial Similarity Evaluation.

Plaintiff's complaint includes several lists, purporting to demonstrate that *Princess of Thieves* is "identical" in themes, plots, characters and dialogue to plaintiff's copyrighted work. These enumerated examples are either inaccurate when compared to the scripts and videos of the works, or consist of largely nonprotectible generic themes or plot elements that naturally flow either from the Robin Hood legend or from a generic coming of age story.

Courts generally view such lists as unreliable and *not probative* of substantial similarity. As stated in *Litchfield*, 736 F.2d at 1356, lists of similarities are "inherently subjective and unreliable," and courts are "particularly cautious where, as here, the list emphasizes random similarities scattered throughout the work." *See also Herzog*, 1998 U.S. Dist. LEXIS 22503, at *44 (finding list of similarities unreliable because "many similarities could be found in very dissimilar works"); *Kouf*, 16 F.3d at 1045-46 (finding plaintiff's "compilation of 'random similarities scattered throughout the works,' such as a lawnmower scene, a sprinkler scene, the presence of an attic, danger scenes, and concerned parents unpersuasive); *Warner Bros.*, 654 P.2d at 209 (similarities listed are general *scenes a faire* inherent to a story about a superhero, e.g., performance of feats of miraculous strength, wearing tights, battling villains, flying with arms extended, being impervious to bullets, x-ray vision, and are insufficient to establish infringement). It is inappropriate for a court to "simply focus on isolated elements of each work to the exclusion of other elements, combination of elements, and expressions therein." *Sid &*

Marty Krofft Television, 562 F.2d at 1157. Thus, even assuming that plaintiff's lists were accurate, they would not establish substantial similarity.

In fact, however, when this Court views the two works, it will see that plaintiff's lists are *not* accurate. A few examples make the point, although there are more. First, plaintiff alleges that the phrase "kill two birds with one stone" is used in both works to refer to a plot to kill Robin Hood. Complaint, ¶21(m). In fact, this uncopyrightable common cliché is used in the two works by different characters in entirely different contexts. In *sHerwood*, one of Margaret's vixens uses the phrase in connection with a plan to kill Robin Hood, making a pun on the name Robin. See *sHerwood* script, Exhibit A to Answer and Affirmative Defenses of Defendant Granada US Productions ("*sHerwood* script"), at 4. In *Princess of Thieves*, Gwyn uses the phrase when she asks Robin Hood to take her along on his mission to protect Prince Philip so that, during the journey, she can demonstrate her riding skills to him and he can thus "kill two birds with one stone." See *Princess of Thieves* script, Exhibit C to Answer and Affirmative Defenses of Defendant Granada US Productions ("*Princess of Thieves* script"), at 15-16. The coincidental use of a common English phrase in both works in entirely different contexts obviously cannot establish substantial similarity. See *Narell*, 872 F.2d at 911 ("Ordinary phrases are not entitled to copyright protection").

The list also claims that in both works Prince John plots with "an evil female character" to capture Robin Hood and ascend to the throne. Complaint, ¶20(d). This alleged similarity is inaccurate. In *sHerwood*, Prince John conspires with Margaret the witch to use her magic to kill Robin Hood in return for the Sands of Time. In *Princess of Thieves*, however, the "evil female character" is not a witch but a countess and she has nothing to do with any plot to capture Robin Hood. Rather, her only role in the film is to escort Prince Philip from France to England, where

Prince John has arranged to have him killed. In any event, the idea of an “evil female character” is common in literature, e.g. Pandora, Eve, Lady Macbeth, and the wicked stepmothers in numerous fairy tales. This idea is not copyrightable.

The complaint also alleges that both Gwyn and Robyn win archery contests by splitting their opponent’s arrow. Complaint, ¶21(d). This is inaccurate, however, because, as explained above, only Gwyn enters an archery contest and wins it by splitting the Sheriff’s arrow. *Princess of Thieves* Script at 59-61. Robyn, in *sHerwood*, competes only with Junior and defeats him by knocking over a sapling. *sHerwood* Script at 26.

Plaintiff’s list also alleges that in both works “Robin Hood explains to his daughter that ‘real fighting’ is not like standing and aiming at a bull’s eye in a tournament.” Complaint, ¶21(h). In fact, this does not occur in *either* work. In *sHerwood*, it is Junior, not Robin Hood, who tells Robyn that outshooting him “at a stand off” is not like a battle with hand to hand combat and sword fighting. *sHerwood* Script at 31. In *Princess of Thieves*, Gwyn is not even present when Robin Hood makes a comparison between a battle and shooting at a bull’s eye. Instead, in response to Will Scarlett’s interest in seeing Gwyn shoot, he tells Will, “It’s one thing to hit your mark in play, quite another in battle.” *Princess of Thieves* script at 19. The two scenes involve different characters and different situations, and neither involves a conversation between Robin Hood and his daughter.

Aside from such inaccuracies in plaintiff’s “list,” most of the alleged similarities constitute generic themes or unprotected *scenes a faire*. For example, plaintiff asserts that the following similarities in the two works demonstrate copyright infringement:

- The evil villain is Prince John who has been left in charge of the kingdom while his brother, King Richard, fights in the crusades;

- Robin Hood's daughter engages in an archery contest;
- Robin Hood's daughter disguises herself as a boy to integrate herself into the band of Merry Men;
- Robin Hood's daughter is kind to the poor; and
- Good triumphs over evil when the rightful heir ascends to the throne.

See Complaint, ¶ 21.

As demonstrated above, these themes and plot elements derive directly from the unprotectable Robin Hood legend and *scenes a faire* arising from the legend. They cannot support a claim for copyright infringement as a matter of law.

IV. CONCLUSION

For the reasons set forth above, defendants respectfully request that the Court grant their motion for judgment on the pleadings and dismiss the complaint with prejudice.

Respectfully submitted,

Dated: October 22, 2002

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CERTIFICATE OF SERVICE

I hereby certify that on this day, a true and correct copy of (1) Defendant Granada's Motion for Judgment on the Pleadings; (2) Proposed Form of Order; (3) the Memorandum of Law in Support of Defendant Granada's Motion for Judgment on the Pleadings; and (4) the Exhibits in Support of Defendant Granada's Motion for Judgment on the Pleadings were served, by hand delivery upon plaintiff addressed as follows:

Gavin P. Lentz, Esquire
Bochetto & Lentz, P.C.
1524 Locust Street
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Dated: October 22, 2002

Joyce S. Meyers